IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1781 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BAGSARA NAGAR PALIKA

Versus

ANANTRAY N PARMAR

Appearance:

1. Special Civil Application No. 1781 of 2003
MR MULIYA FOR MR PARTHIV B SHAH for Petitioner No. 1
MS SANGITA PAHWA FOR M/S THAKKAR ASSOC. for Respondent No. 1
..... for Respondent No. 2-14

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 25/04/2003

ORAL JUDGEMENT

#. Heard learned advocate Mr.Muliya for learned advocate Mr.Parthiv B. Shah appearing on behalf of the petitioner and learned advocate Ms.Sangeeta Pahwa for respondent workmen appearing on caveat.

Rule. Learned advocate Ms.Sangeeta Pahwa waives service of rule on behalf of the respondents - workmen.

Today, when the present petition is taken up for hearing, an affidavit-in-reply is filed on behalf of the respondents-workmen and a copy thereof has been served on the learned advocate for the petitioner.

#. In the present petition, the petitioner has challenged the award passed by the Industrial Tribunal, Bhavnagar dated 30th October, 2002 in the Reference [IT] No.57/94, wherein the Industrial Tribunal has directed the present petitioner to confirm 21 workmen whose names are mentioned in the operating portion of the award with effect from 1st January, 1995 and also directed to fix their pay scale and to pay them difference of salary with effect from 1st January, 1998.

#. Learned advocate Mr.Muliya appearing on behalf of the petitioner has submitted that all these workmen were working as workmen of the Octroi Collector Contractor and / or Ijaredar and now the system and / or practice of collection of octroi duty has been abolished and therefore, the petitioner is not able to confirm all these workmen because no work is available with the petitioner. He also submitted that the Government Circular dated 17th October, 1988 is not applicable to the petitioner. He also submitted that these workmen were recruited or employed by the petitioner without following the due procedure of law and so far as the petitioner institution is concerned, there is procedure of recruitment as per the Rules which required written examination as well as oral interview. These workmen were not appointed accordingly. It is also his submission that the financial condition of the petitioner institution is not good and therefore also, the workmen concerned cannot be given effect of the impugned award as the petitioner cannot bear the burden of granting difference of salary to the respondents - workmen. He also submitted that in the event, if the impugned award is required to be implemented by the petitioner, then again, financial condition of the petitioner will be adversely affected and therefore, he submits that the

Industrial Tribunal, Bhavnagar has committed gross error in granting benefits in favour of all 21 workmen with effect from 1st January, 1995 and also with effect from 1st January, 1998 granting difference of salary in favour of the respondent workmen. He also submitted that the tribunal has committed error while not appreciating the financial condition of the petitioner which is, of course, no good and healthy and on this aspect, relevant material though produced on record by the petitioner, the same has not been taken into account by the tribunal. He also submitted that these workmen were continuing in service because of the fact that this Court has passed the interim order. It is also submitted that earlier they were employees of the Ijaredar and they were not the employees of the petitioner since the work of collection of the Octroi duty was given to the contractor. However, due to the interim order passed by this Court, these workmen remained in service and at present they are working with the petitioner. It is also contended that as such there is no relationship of employer and employee say master and servant between the petitioner and the respondents workmen and since the Government has abolished the octroi system with effect from May, 2000 and therefore, these workmen become surplus in the petitioner institution. However, the petitioner has accommodated these workmen in other department. Thus, it is submission on behalf of the petitioner institution that the tribunal has committed gross error in granting the relief in favour of the respondents workmen.

#. Learned advocate Ms.Sangeeta Pahwa for the respondents appearing on caveat submitted that the tribunal has rightly appreciated the oral and documentary evidence which are on record before the tribunal. In fact, these workmen remained in service with the petitioner for more than 10 years and these facts are undisputed between the parties. If these workmen have been recruited by due procedure of law or otherwise, they remained continued in service and performed their work without any complaint, that is enough, to give them benefit of permanency so that they may get regular salary as the employees so that the workmen are able to maintain their family. She also submitted that to keep such workmen for a long period of more than 10 years as daily wagers, that itself can be said to be unfair labour practice committed by the petitioner and therefore, the Union has raised dispute about permanency of the workmen and after considering the entire evidence on record, the Industrial Tribunal, Bhavnagar has rightly granted the benefits in favour of the respondent workmen. She also

submitted that while granting the benefits, the Industrial Tribunal has considered various decisions of the Apex Court and thereafter passed necessary orders which require no interference by this Court while exercising the jurisdiction under Article 226 and 227 of the Constitution of India and the petition filed by the petitioner institution may be rejected at the threshold.

#. Learned advocate Ms.Sangeeta Pahwa has submitted that in the operating portion of the award of the tribunal at page-21 of this petition, in fact, the benefit has been given with effect from 1st January, 1993 but there is some clerical mistake by the tribunal and it is described as 1995. However, it is stated that for seeking correction, necessary application has been moved by the Union before the Industrial Tribunal concerned and according to her, the tribunal concerned has correct the effect of the order accordingly but she submits that she does not have a copy of the order whereby such mistake has been ordered to be rectified by the tribunal concerned.

#. I have considered submissions of the learned advocates for the parties. This Court has also perused the award passed by the Industrial Tribunal, Bhavnagar impugned in this petition. It is pertinent to note that fact remains that initially these workmen were the employees of the Contractor and / or Ijaredar who was entrusted the work of collecting the octroi duty in the petitioner institution but fact remains that the workmen remained in service for more than ten years with the petitioner as daily wager. To continue such workmen as daily wager for pretty long period without giving them benefits of permanency, that itself is unfair labour practice which, obviously, seems to have adopted by the petitioner. The tribunal has considered the statement of claim and written statement submitted by the petitioner vide Exh.10. Thereafter, the Tribunal has considered the order passed by this Court. The tribunal has also considered the documents produced by the respondent vide Exh.16 and 26. In pursuance of the order of this Court passed in Special Civil Application No.892 / 1988, the Reference was proceeded further and thereafter, evidence of the petitioner was ordered to be closed. Then, the Industrial Tribunal, Ahmedabad has considered the merits of the matter. In the impugned award, the Industrial Tribunal has in para-14 specified, whether the workmen are entitled to benefits of the award. In para-16 the tribunal has considered the merits of the matter. The tribunal has come to the conclusion that it is not

disputed that these workmen initially appointed or engaged by the Ijaredar and because of the order passed by this Court, the workmen remained in continues in service. The tribunal has also considered that the petitioner himself collecting the octroi instead of Ijaredar and on that occasion, these workmen were engaged for a period from 1989-97 and completed 240 days in each year and also completed continues service from 1988-98. This finding of fact arrived at by the tribunal on the basis of the records. The tribunal has also considered one important aspect that they remained in continuous service for more than 10 years with the petitioner but there was no complaint against these workmen by the petitioner. It is also not disputed that at present also, all these workmen are working in different departments and therefore, considering the decision of the Apex Court in reported in 1996 CLR 680 and other decisions, the tribunal has come to the conclusion that the workmen are entitled to status of permanent employees of the petitioner with all consequential benefits alike permanent employees. Accordingly, the tribunal has granted benefits by directing the petitioner to confirm each workmen whose names are mentioned in operating portion with effect from 1-1-1995 and give them difference of salary with effect from 1-1-1998 and the earlier period with effect from 1st January, 1993 upto 31st December, 1997, are required to be treated as notional.

#. I have perused the entire award passed by the Tribunal, Bhavnagar. In similar situation, the Apex Court has considered the case of Gujarat Agricultural University v. Rathod Labhu Bechar reported in AIR 2001 SC 706. After considering the facts of that case, the Apex Court observed after examining the proposed scheme of the Gujarat Agricultural University in para-26 which is narrated as under :-

"26. IN the light of the aforesaid decision we now proceed to examine the proposed scheme. Under Clause 1 it is proposed that all daily wage workers, whether skilled, semi-skilled or unskilled who have completed 10 years or more of continues service with a minimum of 240 days in each calender year as on 31st December, 1999 is to be regularised and be put in the time scale of pay applicable to the corresponding lowest grade in the university. However, the said regularisation is subject to some conditions. Under Clause 1[a] such employee is eligible only

if he possess the prescribed qualifications for the post at the time of their appointment. The strong objection has been raised to this eligibility clause. The submission is, those working for a period of 10 ore more years without any complaint is by itself a sufficient requisite qualification and any other rider on the facts of this case would prejudice these workers. We find merit in this submissions. We have perused the qualifications referred in the aforesaid recruitment rules according to which, qualification for Peon is that he should upto 8th Standard, for Operator-cum-mechanic, should have diploma in mechanic having sufficient knowledge of vehicle repairing experience in automobiles or tractors Dealers workshop for two years, for Chowkidar, he must be literate and have good physique. Literate is not defined. For Plumber to have I.T.I. Certificate.

We feel that daily rate workers who have been working on the aforesaid posts for such a long number of years without complaint on these posts is a ground by itself for the relaxation of the aforesaid eligibility condition. It would not be appropriate to disqualify them on these ground for their absorption, hence Cl.[1][a] need modification to this effect."

#. This Court had also an occasion to consider the case having identical facts wherein the Industrial Tribunal has granted benefits of permanency in favour of the Off-day Reliever Watchman who was continued for more than ten years in continuous service with the State Transport Corporation. This Court, while dealing with the facts and circumstances of that case, rejected that writ petition being Special Civil Application No.8189 of 2001 in case of G.S.R.T.C. v. A.M.Shaikh filed by the corporation reported in 2002 GLR [2] 1807 wherein, this Court has directed for implementation of the award passed by the tribunal granting benefits of permanency. The relevant observations made in para-10 of the said judgment by this Court are referred as under :-

"10. Recently, the Apex Court has also considered this aspect of regularisation in service and also as regular pay scale to such daily wager employees in case of Gujarat Agricultural University v. Rathod Labhu Bechar, reported in AIR 2001 SC 706.

Relevant observations made in Paras. 18,19 and 30 are quoted as under :-

"18. What emerges is, all the respondent workmen are eligible for absorption on the facts of this case subject to any eligible qualification under the rule if any. Though no recruitment rules were filed in the proceedings either before the Tribunal or in the High Court but while proposing the scheme a copy of the recruitment rules for various cadres have been placed before us on behalf of the appellant University. This gives in column NO.1 the serial No., in Column No.2 the name of the post, in column No.3 the pay scale, in column No.4 the age-limit and in Column No.5 the qualification, Serial No.10 deals with Peon and Class IV servants, Serial No.13 deals with Operator-cum-Mechanic, Serial No.14 deals with Chowkidar, Serial No.25 deals with Plumber and Serial No.33 deals with Carpenter. This shows that recruitment rules did have these post in its ambit about which we are concerned, yet no posts were created. This proposed creation of post is churned out only after this long battle by the workmen as against the appellant. It was not expected from the institutions like the present appellant, especially when it is fully funded by the State Government that this process of absorption should have taken such a long time and to have yielded to it only after this long battle. This legal position is well known not only to the appellant but the State who is funding it, then why to do it only after Courts' intervention. It is true creation of post does involved financial implication. Hence, financial health of a particular institution plays important role to which Courts also keep in mind. The Court does exercise its restraint where facts are such where extent of creation of post creates financial disability. But at this juncture, we would like to express our note of caution, that this does not give largess to an institution to engage large number of daily wage workers for long number of years without absorbing them or creating posts which constitutes an unfair labour practice. If finances are short engagement of such daily wager workers could only be for a short limited period and if continuous work is required it could only do so by crating permanent

post. If finances are not available, take such work which is within financial mean. Why take advantage out of it at the cost of workers.

"19. One of the question which is also up for our consideration is, apart from the fact who are to be regularise, what would be payable to these daily wage workers who have completed more than 10 years of continues service. Submissions for the respondents is, that such daily wager workers should be paid the same minimum scale of pay as admissible to the regularised incumbent based on the principle of `equal pay for equal work'. Daily rated causal labour employed under P & T Department through Bhartiya Dak Tar Mazdoor Manch v. Union of India, AIR 1987 SC 2342 : 1988 Lab. IC 37 [supra] was a case of daily rated casual labourers of the P & T department doing work similar to that of the regular workers of the department. This Court held :

".... Even though the Direction Principle contained in Arts.38 and 39[d] may not be enforceable as such by virtue of Art.37, but it may be relied upon by the petitioners to show that in the instant case they have been subjected to hostile discrimination. The State cannot deny at least the minimum pay in the pay-scales of regularly employed workmen even though the Government may not be compelled to extend all the benefits enjoyed by regularly recruited employees. Such denial amounts to exploitation of labour. The Government cannot take advantage of its dominant position and compel any worker to work even as a casual labourers on starvation wages. It may be that the casual labourers has agreed to work on such low wages .... ".

30. According to the State counter if absorption is made from 1-1-1993 of all those who have completed ten years of service as per Tribunal order, the payment towards arrears would be to the tune of 16 crores. Since in the proposed scheme, absorption is from 1st January,

2001, the State has already gained much more than this arrears of more than 15 cores. In this light and in the absence of details being placed before us, we are leaving the extent of creation of the posts on the State Government. We hope and trust, the Government who is the guardian of the people and is obliged under Art.38 of the Constitution, to secure a social order for the promotions of welfare of the people, to eliminate inequalities in status, will endeavour to give maximum posts even at the first stage of absorption, and D.D.O. the same in the same spirit for creating additional posts after enquiry as we are indicating hereunder.It is necessary that the State Government to set up an enquiry to find what further number of additional posts are required for regularizing such other daily rated workers, and after assessing it, to create such additional posts for their absorption. This exercise should be done by the State Government within a period of six months. The submission on behalf of the respondent is that those who are not regularised and are continuously working for 10 or more years with minimum of 240 days in each calender year, they should be paid minimum pay scale as admissible to an incumbent regularised on similar post doing similar work instead of minimum wages as prescribed by the Government. The dispute thus is, whether such workers to be paid minimum daily wage as Government prescribes as per the scheme or pay them the minimum pay scale admissible to such regularised worker without increment and other benefit. This Court in one set of decisions have said to regularise them in one block and pay them the same minimum pay scale as admissible to a regular employee as in; Surinder Singh v. Engineer-in-Chief, C.P.W.D., 1986 [1] SCC 639 : AIR 1986 SC 584 : 1986 Lab.IC 551, U.P. Income Tax Department Contingent Paid Staff Welfare Association v. Union of India, 1987 Supp.SCC 658 : AIR 1988 SC 517 : 1988 Lab.IC 958, State of Punjab v. Devinder Singh, 1998 [9] SCC 595, Chief Conservator of Forests v. Jagannath Maruti Kandhare, 1996 [2] SCC 293 : 1996 AIR SCW 735 : AIR 1996 SC 2898 : 1996 Lab.IC 967, and in other cases to absorb in a phased manner under a scheme which depends on the facts of each case. In Mool Raj Upadhayaya v. State of H.P., 1994 Supp [2] SCC 316, [supra], this Court approved a scheme under which the

daily wage workers whether skilled or unskilled who have not completed 10 years of service was to be paid daily wage at the rates prescribed by the Government of H.P. from time to time for daily wage employees falling under Class III and IV till they are appointed regularly. Strong reliance is placed on behalf of the University on this case and also, looking to the fact that it has not impressive source of its own, being an Agricultural University, depending on the State fund, we hold they should be paid minimum wages as prescribed by the Government from time to time as proposed under the scheme. We approve both clauses 2 and 3 on the facts and circumstances of this case. In fact, in seeking minimum pay scale to such daily rated workers as admissible to a regular employee is based on the principle of `equal pay for equal work'. It is pertinent to refer, in this case the observations of the High Court :

> "..... Workmen are not claiming `equal pay for equal work' but they are claiming permanent status as Class IV employees as they are working and have gained more than sufficient experience in their work.... "

#. In view of above observations made by the Apex Court and considering the fact that if the workmen temporary or daily wager had completed more than ten years continues, then the employer should have granted benefits of permanency irrespective of the fact that whether they are qualified or unqualified, otherwise, it amounts to unfair labour practice. Therefore, considering the decision of this Court as well as Apex Court, according to my opinion, the tribunal has rightly appreciated the oral as well as documentary evidence and granted benefits in favour of the workmen who are continued in service undisputedly with the petitioner for more than ten years. The tribuna has rightly directed the petitioner to grant benefits of permanency in favour of the respondent workmen and the tribunal has given reason in support of its conclusion, for which, the tribunal has not committed any error which requires any interference by this Court. As such, there is no procedural irregularity committed by the tribunal and there is no infirmity in the award. Even if otherwise, two views are possible, then also, this Court is having limited jurisdiction under Article 226 and 227 of the Constitution to interfere with the

finding of fact based on the record arrived at by the Industrial Tribunal. This aspect has been recently examined by the Apex Court in case of ESSEN DEINKI V. RAJIV KUMAR, 2003 SC Labour & Service page 13. Relevant paragraphs are as under:

2. Generally speaking, exercise of jurisdiction under Article 227 of the Constitution is limited and restrictive in nature. It is so exercised in the normal circumstances for want of jurisdiction, errors of law, perverse findings and gross violation of natural justice, to name a few. It is merely a revisional jurisdiction and does not confer an unlimited authority or prerogative to correct all orders or even wrong decisions made within the limits of the jurisdiction of the courts below. The finding of fact being within the domain of the inferior tribunal, except where it is a perverse recording thereof or not based on any material whatsoever resulting in manifest injustice, interference under the article is not called for.

3. The observations above, however, find affirmance in the decision of this Court in Nibaran Chandra Bag V. Mahendra Nath Ghughu. In Nibaran this Court has been rather categorical in recording that the jurisdiction so conferred is by no means appellate in nature for correcting errors in the decision of the subordinate courts or tribunals but is merely a power of superintendence to be used to keep them within the bounds of their authority. More recently, in Mani Nariman Daruwala Vs. Phiroz N.Bhatena this Court in a similar vein stated: (SCC pp. 149-50, para 18)

"In the exercise of this jurisdiction the High Court can set aside or ignore the findings of fact of an inferior court or tribunal if there was no evidence to justify such a conclusion and if no reasonable person could possibly have come to the conclusion which the court or tribunal who (sic) has come or in other words it is a finding which was perverse in law. Except to the limited extent indicated above the High Court has no jurisdiction to interfere with the findings of fact."

4. Needless to record that there is total

unanimity of judicial precedents on the score that error must be that of law and patently on record committed by the interior tribunal so as to warrant intervention - it ought not to act as a court of appeal and there is no dissension or even a contra-note being sounded at any point of time till date. Incidentally, the illegality, if there be any, in an order of an inferior tribunal, it would however be a plain exercise of jurisdiction under the article to correct the same as otherwise the law courts would fail to subserve the needs of the society since illegality cannot even be countenanced under any circumstances.

5. In this context reference may also be made to a still later decision of this Court in the case of Savita Chemicals (P) Ltd. Vs. Dyes & chemical Workers' Union wherein this Court in para 19 of the Report observed: (SCC p. 166)

"Under Article 227 of the Constitution of India, the High Court could not have set aside any finding reached by the lower authorities where two views were possible and unless those findings were found to be patently bad and suffering from clear errors of law."

##. In view of above observations and considering the limited powers of this Court, when there is apparently no error committed by the tribunal while passing such award, then there requires no interference by this Court while exercising the powers under Articles 226 and 227 of the Constitution and therefore, there is no substance in the present petition.

In view of above discussion, this petition does not succeed and the same is rejected accordingly. Rule stands discharged with no order as to costs.

##. However, it made clear that in case if any clerical mistake has crept in in the operating part of the impugned award passed by the tribunal as per the submission made by the learned advcoate Ms.Sangeeta Pahwa and upon application moved for correction of said mistake, if the tribunal concerned has rectified such mistake, in such eventuality, the award in question requires to be read accordingly as per amendment and the effect of rejection of this writ petition is also equally applicable to the correction that might have been made by the tribunal in respect of the application submitted by

the respondent workmen whereby the tribunal has correct the date of permanency as 1-1-1993 instead of 1-1-1995.

Date : 25-4-2003 [H.K.Rathod, J.]

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